


4-1-2011

## The Truth Shall Set You Free: A Distinctively Christian Approach to Deception in the Negotiation Process

Al Sturgeon

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>

 Part of the [Dispute Resolution and Arbitration Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal Profession Commons](#), [Litigation Commons](#), [Other Law Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Al Sturgeon, *The Truth Shall Set You Free: A Distinctively Christian Approach to Deception in the Negotiation Process*, 11 Pepp. Disp. Resol. L.J. Iss. 3 (2011)  
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol11/iss3/8>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact [josias.bartram@pepperdine.edu](mailto:josias.bartram@pepperdine.edu), [anna.speth@pepperdine.edu](mailto:anna.speth@pepperdine.edu).

# The Truth Shall Set You Free: A Distinctively Christian Approach to Deception in the Negotiation Process

Al Sturgeon\*

## I. INTRODUCTION

When America Online was king of the business world in the late 1990s, its negotiators would purposely “make a mistake” by including the logo of a prospective client’s rival in a PowerPoint presentation.<sup>1</sup> The negotiator would feign embarrassment and apologize, but the supposed gaffe was completely intentional in the hopes that it would encourage the prospective client to make a deal.<sup>2</sup> This tactic is mentioned as a potential negotiation strategy in a modern textbook on Negotiation Theory.<sup>3</sup> Is it ethical in the legal sense of the word? If so, does that make it *right*? And, how does one go about deciding what is right in the first place?

The *Model Rules of Professional Conduct* provide nonbinding recommendations regarding ethics in negotiations, and in so doing establish that deception may be appropriate in certain situations.<sup>4</sup> Some commentators agree that some deception in negotiation is appropriate.<sup>5</sup>

---

\* J.D. candidate, Pepperdine University School of Law. The author wishes to thank his wife and daughters for their faithful love and support.

1. Alec Klein, *Lord of the Flies*, WASH. POST, June 15, 2003, at W06, available at <http://www.washingtonpost.com/ac2/wp-dyn/A46842-2003Jun11>.

2. *Id.* Klein’s article is critical of the “effective but brutal techniques” employed by America Online during this time period and chronicles the eventual demise of the primary strategists due to accounting practices characterized as “bending the rules.” *Id.*

3. LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 46 (2009). The American Online tactic is offered as an example of when a negotiator might reveal her options (in negotiation theory parlance, her “BATNA”) in a section on “Pie-Slicing Strategies” in the chapter, “Essentials of Negotiation.” The author does not say whether the strategy is good or bad but simply offers it for the reader’s consideration. *Id.*

4. See *infra* Part II.A.

5. See *infra* Part II.C.1.

Others argue that it is always unethical.<sup>6</sup> Still others argue for some sort of a middle ground, acknowledging the inevitability of deception in negotiation, yet offering paths to mitigate its use.<sup>7</sup> There is no consensus.

This paper examines whether the Christian religion offers a distinct position on the use of deception in the negotiation process. It is expected to be of primary interest to Christian negotiators, but combining the popularly-understood theorem that “everyone negotiates on some level” with the fact that there are over 173 million Christian adherents in the United States alone,<sup>8</sup> the topic may be of general interest to anyone who negotiates. There is apparently neither an official nor a widespread recognition of a distinct Christian position on the use of deception in negotiation at present. It is this article’s proposal, however, that Christianity calls its adherents to practice truthfulness in negotiations, to live free from the forces that engender deception, and to form healthy relationships with others based on reliability.

Section II will examine the American Bar Association’s ethical standard regarding truthfulness in negotiation, the inherent qualities of negotiation that foster deceptive strategies, and the various positions argued by commentators. Section III will analyze a Christian approach to the topic, the rationale behind that approach, and its application to the “real world.” Finally, Section IV will offer a conclusion.

## II. BACKGROUND

### A. *The Law Regarding Deception in Negotiation*

Rule 4.1 of the *Model Rules of Professional Conduct* (MRPC)—“Truthfulness in Statements to Others”—establishes the ethical standard regarding deception in negotiations with a heavy emphasis on statements of material fact.<sup>9</sup> The rule states that:

In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to

---

6. See *infra* Part II.C.2.

7. See *infra* Part II.C.3.

8. BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY 2008, [http://b27.cc.trincoll.edu/weblogs/AmericanReligionSurvey-ARIS/reports/pla\\_belong.html](http://b27.cc.trincoll.edu/weblogs/AmericanReligionSurvey-ARIS/reports/pla_belong.html) (last visited Dec. 21, 2009). This number represents 76% of the total population. *Id.* It is assumed that a large number of negotiators in the United States are professing Christians; thus, the ethical topic of this paper should be of popular interest.

9. MODEL RULES OF PROF’L CONDUCT R. 4.1 (2009).

[Vol. 11: 395, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . . .<sup>10</sup>

The Comment to Rule 4.1 notes that there is no affirmative duty to inform the opposing party of relevant facts.<sup>11</sup> Further, examples of generally accepted negotiation tactics are specifically excluded from consideration as statements of material fact in the Comment.<sup>12</sup> Included in the list of examples is a negotiation practice commonly known as “puffing,” defined in Black’s Law Dictionary as “[t]he expression of an exaggerated opinion—as opposed to a factual representation—with the intent to sell a good or service.”<sup>13</sup>

However, an expression of an opinion can still be deceptive. Webster defines “deceive” as “[t]o give a false impression” without reference to whether or not the act causing the impression was a statement of fact or opinion.<sup>14</sup> Therefore, when Rule 8.4(c) in the section of the MRPC regarding “Maintaining the Integrity of the Profession” states that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation,”<sup>15</sup> puffing technically appears to apply.

Nonetheless, when the American Bar Association’s Standing Committee on Ethics and Professional Responsibility addressed the topic of a “Lawyer’s Obligation to Truthfulness When Representing a Client in Negotiation” in a formal opinion in 2006,<sup>16</sup> the Committee recognized “[i]t is not unusual in a negotiation for a party, directly or through counsel, to make a statement in

---

10. *Id.*

11. See MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. (2009).

Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

*Id.*

12. See *id.*

13. BLACK’S LAW DICTIONARY 1247 (9th ed. 2004).

14. WEBSTER’S NEW COLLEGE DICTIONARY 298 (3rd ed. 2008).

15. MODEL RULES OF PROF’L CONDUCT R. 8.4 (2009).

16. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-439 (2006) [hereinafter Formal Opinion]. The impetus for the Formal Opinion was the application of the Rules to a special type of negotiation known as “caucused negotiation,” where parties are separated during the negotiation process. See *id.*

the course of communicating its position that is less than entirely forthcoming” and stated that such statements of puffing should be “distinguished from false statements of material fact.”<sup>17</sup> The opinion further stated that “a lawyer may downplay a client’s willingness to compromise” as well as make “overstatements or understatements of the strengths or weaknesses of a client’s position.”<sup>18</sup>

Therefore, it appears that the mischaracterization of a position is considered ethical according to the MRPC as long as the mischaracterization is not considered to be regarding a material fact. Simply, deception is considered ethical in certain negotiation settings according to the American Bar Association.

### *B. The Desirability of Deception*

Why do negotiators seek to deceive in the first place? The most obvious answer is to win the negotiation.<sup>19</sup> To that end, several unique features of negotiation foster the use of deceptive tactics by making it easy to legally employ them at the bargaining table.

First, negotiators have no obligation to truthfully state their position: negotiators can overstate or understate their positions without legal repercussions.<sup>20</sup> Second, negotiators are not held to a general standard of good faith when acting in their self-interest: because it is simply negotiating rather than contractual, there is no legal duty of good faith.<sup>21</sup> Third, negotiators can misrepresent their interests without being considered to have lied about material facts.<sup>22</sup>

Finally, what Professor Joseph Allegritti refers to as “the standard vision” of the role of a lawyer as the neutral partisan of the client facilitates

---

17. *Id.*

18. *Id.*

19. See ROGER FISHER & WILLIAM URY, GETTING TO YES 129 (1981). In fact, parents of small children realize that the use of deceptive negotiation tactics to “win” appears very early in life.

20. See THOMPSON, *supra* note 3, at 175. For example, in a salary negotiation a party may ask for significantly more than she is willing to accept. *Id.*

21. See *id.* at 176. Thompson quotes the Seventh Circuit in *Feldman v. Allegheny International, Inc.*, 850 F.2d 1217, 1223 (7th Cir. 1988), which said,

In a business transaction, both sides presumably try to get the best deal . . . . So, one cannot characterize self-interest as bad faith. No particular demand in negotiations could be termed dishonest, even if it seemed outrageous to the other party. The proper recourse is to walk away from the bargaining table, not sue for “bad faith” negotiations.

THOMPSON, *supra* note 3, at 176.

22. See THOMPSON, *supra* note 3, at 176. See also *supra* Part II.A.

[Vol. 11: 395, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the use of deceptive tactics.<sup>23</sup> Allegretti explains that this vision of a lawyer's role provides a ready response to the specific question of how a lawyer can ethically deceive an opponent in a negotiation: "A lawyer serves his client as a neutral (he ignores his own values and stays away from morals) partisan (he does whatever it takes to win)."<sup>24</sup> When firmly entrenched, this vision removes any ethical dilemma from the mind of the lawyer.

However, just because it is easy to both employ and justify the use of deceptive tactics does not mean it would necessarily be desirable to do so. In the end, deceptive tactics are consistently used by negotiators because they are effective. As Professor Gerald Wetlaufer explains:

Effectiveness in negotiations is central to the business of lawyering and a willingness to lie is central to one's effectiveness in negotiations. Within a wide range of circumstances, well-told lies are highly effective. Moreover, the temptation to lie is great not just because lies are effective, but also because the world in which most of us live is one that honors instrumental effectiveness above all other things. Most lawyers are paid not for their virtues but for the results they produce. . . . Accordingly . . . lying is not the province of a few 'unethical lawyers' who operate on the margins of the profession. It is a permanent feature of advocacy and thus of almost the entire province of law.<sup>25</sup>

Therefore, because deceptive tactics are effective in producing a win for the client, negotiators consistently consider them desirable tools in their work.

### C. *An Outline of Commentary*<sup>26</sup>

There are a variety of opinions on the appropriateness of deception in negotiations. Some maintain that deception is necessary and appropriate at

23. JOSEPH G. ALLEGRETTI, *THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* 8-9 (1996). According to Allegretti, this vision is the vision of the *Model Rules of Professional Conduct*, and it encourages attorneys to serve as "the amoral instrument of the client." *Id.* See also Thomas G. Bost, *The Lawyer as Truth-Teller: Lessons From Enron*, 32 PEPP. L. REV. 505, 506 (2005); L. Timothy Perrin, *Lawyer as Peacemaker: A Christian Response to Rambo Litigation*, 32 PEPP. L. REV. 519, 519-21 (2005).

24. ALLEGRETTI, *supra* note 23, at 9. It also provides answers to critical questions of lawyers such as: "How can a lawyer defend the 'guilty'?" and "How can a lawyer help a client avoid paying taxes or evade environmental regulations?" *Id.*

25. Gerald Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1272 (1990). In his article, Wetlaufer does not condone the use of deception but readily admits its effectiveness. As he puts it, "lying in negotiations is instrumentally effective and . . . most such lies are ethically impermissible." *Id.* at 1221.

26. The framework for this outline is given in Formal Opinion 06-439. See Formal Opinion, *supra* note 16.

times. Others argue that it is never appropriate. Still others claim that its use is inevitable but argue for ways to mitigate its use.

### 1. Deception is Necessary and Appropriate at Times

Professor James J. White argues that deception is necessary in a negotiation.<sup>27</sup> He states that a negotiator “must mislead his opponent.”<sup>28</sup> Comparing a negotiator to a poker player, he suggests that the key characteristic of a successful negotiator “lies in this capacity both to mislead and not to be misled.”<sup>29</sup> White flatly asserts that anyone who disagrees with this stated position is wrong and that even the most honest negotiators actively mislead their opponents regarding their true positions.<sup>30</sup> He explains, “To conceal one’s true position, to mislead an opponent about one’s true settling point, is the essence of negotiation.”<sup>31</sup> White admits that there must be some limits on what type of deceptive behavior is acceptable in a negotiation, but suggests that this belies the difficulty in drafting ethical rules concerning truthfulness in negotiations.<sup>32</sup> As he frames the paradox, “How can one be ‘fair’ but also mislead?”<sup>33</sup>

Likewise, Professor Barry R. Temkin not only suggests that deception is necessary in a negotiation, but also that it is appropriate given the attorney’s role as an advocate.<sup>34</sup> Temkin writes that “[l]awyers posture, threaten, bluff, wheedle, obscure, misdirect, and, often, outright mislead adversaries in order to obtain advantage for their clients”<sup>35</sup> and that “the ability to mislead and

---

27. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926.

28. *Id.* at 927.

29. *Id.*

30. *Id.*

31. *Id.* at 928.

32. *Id.* White’s article discusses the difficulty faced by the drafters of the Model Rules in drafting ethical rules. *See id.* at 938. White argues that drafting effective ethical rules is almost impossible. *Id.* He presents three major obstacles faced by the drafters. First, drafters have to walk a fine line between being too general with the rules (which provide little guidance) and too specific (which are little help with unforeseen problems). *Id.* Second, the drafters are powerless when it comes to whether or not ethical rules will ever be enforced. *Id.* Third, drafters have the difficult task of deciding whether to draft “ideal” or “practical” rules. *Id.* In conclusion, White’s argument is that the drafters should “err on the conservative side” so that the ethical rules they draft are not regularly broken and, when not enforced, cast doubt on all the rules. *Id.* Given this conclusion, White’s argument regarding deception in negotiation can be seen as an attempt to face the reality that negotiators will inevitably employ deceptive tactics on a regular basis.

33. *Id.* at 928.

34. Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179 (2004).

35. *Id.* at 182.

[Vol. 11: 395, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

misdirect an adversary is generally considered a virtue among lawyers.”<sup>36</sup> At the core of Temkin’s argument is not a belief that the use of deception is somehow virtuous; instead, he emphasizes that ethical standards regarding honesty must be balanced with the lawyer’s duty to zealously advocate for his or her client.<sup>37</sup> He concludes, “The adversary system assumes and requires the zealous and vigorous advocacy of attorneys on behalf of their clients. The more aggressive negotiators, including the most ethically aggressive, often obtain optimal results for their clients and develop successful practices. The best bluffers frequently clean up at the poker table.”<sup>38</sup>

In sum, the arguments in favor of the use of deception in negotiation are that (1) it is inherent in the process and therefore unavoidable, and (2) it is appropriately used because of a lawyer’s duty to zealously advocate for the client.

## 2. Deception is Never Appropriate

Judge Alvin B. Rubin argues that deception in negotiation should be eschewed for the good of the legal profession and general society.<sup>39</sup> Judge Rubin sets forth two principles he believes should be followed by negotiators in the legal profession: “Negotiate honestly and in good faith; and do not take unfair advantage of another . . . .”<sup>40</sup> Rubin’s first principle stems from his belief that an ethical guideline is not determined by whether or not it is generally observed.<sup>41</sup> He recognizes that negotiators see negotiation as a game whereas following the rules of the game is all that is required; however, Rubin differentiates between gamesmanship and ethics.<sup>42</sup> He writes, “It is inherent in the concept of an ethic, as a principle of good

---

36. *Id.* at 183.

37. *Id.* at 227.

38. *Id.* The gist of Temkin’s article is that lawyers need simple guidelines in this area to prevent damage to their careers due to misunderstanding the rules. He proposes a safe harbor rule that says, “absent court rule, principle of substantive law, or prior factual representation, an attorney should have no duty to make any affirmative factual representations in the course of settlement negotiations, subject only to the crime/fraud exception.” *Id.* But, “[o]nce an attorney speaks, what is said should be truthful.” *Id.*

39. Alvin B. Rubin, *A Causerie on Lawyers’ Ethics in Negotiation*, 35 LA. L. REV. 577, 592-93 (1975).

40. *Id.* at 593.

41. *Id.* at 589.

42. *Id.* at 586.



conduct, that it is morally binding on the conscience of the professional, and not merely a rule of the game adopted because other players observe (or fail to adopt) the same rule.”<sup>43</sup> Rubin’s first principle relates to his second in that an obligation to negotiate honestly would lessen the possibility of an unfair result.<sup>44</sup> Further, he argues that a “duty of fairness is one owed to the profession and to society; it must supersede any duty owed to the client.”<sup>45</sup>

In conclusion, Rubin admits that practitioners who believe that deception is either unavoidable or necessary to represent a client might label his principles as impractical, but he argues that society’s low opinion of the ethical nature of the legal profession lends credence to the value of adopting his two principles anyway.<sup>46</sup>

Professor Michael H. Rubin<sup>47</sup> adds to his father’s argument by drawing attention to the fact that the bar has not adopted the same rules for negotiations outside of litigation<sup>48</sup> and those occurring during litigation.<sup>49</sup> Professor Rubin finds the distinction unfortunate and concludes:

If you would not do something in a courtroom context, if you would not make a misleading statement in a settlement conference with a judge, and if you would not remain silent about a misstatement made by your client or partner during discussions in court chambers or in open court, then you should not do any of these things in non-

---

43. *Id.* at 589.

44. *Id.* at 591.

45. *Id.* at 592.

46. *Id.* at 592-93. He writes:

One who has actively practiced law for over [twenty] years and been a federal trial judge for eight years knows that the theses he has set forth are vulnerable to charges that they are impractical, visionary, or radical. Old friends will shake their heads and say that years on the bench tend to addle brains and lead to doddering homilies. But, like other lawyers, judges hear not only of the low repute the public has for the bench but also of the even lower regard it has for the bar. We have been told so in innumerable speeches but, more important, our friends, neighbors and acquaintances tell us on every hand that they think little of the morality of our profession. They like us; indeed some of their best friends are lawyers. But they deplore the conduct of our colleagues. This is . . . in major part, because many members of the public, not without some support in the facts, view our profession as one that . . . on behalf of clients stoops to almost any chicane that is not patently unlawful.

*Id.* at 592.

47. Professor Michael H. Rubin is son of the late Judge Alvin B. Rubin. Press Release, LSU Paul M. Hebert Law Center, Michael H. Rubin Named 2007 LSU Law Center Distinguished Alumnus of the Year (Aug. 1, 2007), <http://www.bracinsider.org/enl/insider/files/LSU%20LAW%20Press%20Release.pdf> (last visited Dec. 22, 2009).

48. This encompasses the field of Alternative Dispute Resolution.

49. Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 LA. L. REV. 447, 475 (1995).

[Vol. 11: 395, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

litigation negotiations, whether or not they take place prior to or after the filing of a lawsuit.<sup>50</sup>

Professor Reed Elizabeth Loder argues that the assumption that the negotiation process is “inherently and appropriately deceptive” should be more closely scrutinized, and if the characterization is flawed, “thoughtful lawyers should be able and willing to devise ways to reduce deception in fact.”<sup>51</sup> Loder confronts the question of why negotiators should face the moral dilemma posed by the topic in the first place and concludes that “[a] lawyer is both a better person and negotiator for reconceiving negotiation as a collaborative process of moral truthseeking.”<sup>52</sup> As to the former, she writes, “Trickery not only alienates others if detected, but it also thwarts personal development and authenticity that depend upon honest searching and connection.”<sup>53</sup> As to the latter, she argues that this moral authenticity in turn benefits the client by allowing the lawyer to be more in tune with the client’s needs and feelings, to develop resources of empathy and creativity, and to develop a greater sense of honesty between the lawyer and client.<sup>54</sup>

Loder recognizes that some clients might resent a lawyer’s unwillingness to “win at all costs,” but responds that a lawyer should disclose his approach early on so that a client remains free to “shop around.”<sup>55</sup>

In sum, the arguments against the use of deception in negotiation are: (1) to improve the reputation of the legal profession; (2) to achieve greater fairness for society in general; (3) to help the lawyer become a better person; and (4) to allow the lawyer to become a more effective negotiator.

---

50. *Id.* at 476. Professor Rubin argues for a “single ethical standard” to govern both “non-litigation and litigation lawyer conduct.” *Id.* at 449.

51. Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 102 (1994). Professor Loder’s article provides an extensive framework for analyzing deception in negotiation, beginning by defining various types of deception and then considering the adequacy of possible justifications for its use. *See generally id.*

52. *Id.* at 99.

53. *Id.*

54. *Id.* at 101.

55. *Id.* Loder also relates to Judge Rubin’s argument when saying, “Prevalent public mistrust of lawyers may suggest that clients would prefer to hire lawyers concerned with honesty and fairness, especially if lawyers were to educate prospective clients about the relationship between being effective and being ethical.” *Id.*

### 3. Deception is Inevitable in Negotiation, But Its Use Should Be Mitigated

Professor Walter W. Steele, Jr. acknowledges “that some form of deceit, at least in the broadest sense of the word, is inherent in all negotiations,”<sup>56</sup> and yet calls for the adoption of ethical standards greater than that established in MRPC Rule 4.1.<sup>57</sup> Steele proposed a standard based on fairness that he called “Obligation of Fairness and Candor in Negotiation.”<sup>58</sup> He recognized the rhetorical nature of a rule based on fairness, yet argued that lawyers already have a sufficient idea of what constitutes “fair” in a negotiation.<sup>59</sup> He concluded that his standard suggests nothing more than a new demand that a lawyer “not do that which his conscience and his experience tell him is unfair.”<sup>60</sup>

The subtitle of Professor Charles B. Craver’s article betrays his attempt to walk the middle ground when it offers, “How to Be Deceptive Without Being Dishonest.”<sup>61</sup> As his subtitle implies, Craver does not equate deception with dishonesty and believes puffing should not always be considered reprehensible conduct.<sup>62</sup> However, Craver’s ultimate admonition to practicing attorneys is to remember they must live with their own consciences; therefore, the tactics they choose to employ in negotiations should be those they are comfortable using.<sup>63</sup> He concludes, “Attorneys should diligently strive to advance client objectives while simultaneously

---

56. Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1399 (1986).

57. *Id.* at 1402.

58. *Id.* at 1403. His proposed standard states:

When serving as an advocate in court a lawyer must work to achieve the most favorable outcome for his client consistent with the law and admissible evidence. However, when serving as a negotiator lawyers should strive for a result that is objectively fair. Principled negotiation between lawyers on behalf of clients should be a cooperative process, not an adversarial process. Consequently, whenever two or more lawyers are negotiating on behalf of clients, each lawyer owes the other an obligation of total candor and total cooperation to the extent required to insure that the result is fair.

*Id.*

59. *Id.*

60. *Id.* at 1403-04.

61. Charles B. Craver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713 (1997).

62. *See id.* at 715.

63. *See id.* at 733.

[Vol. 11: 395, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

maintaining their personal integrity. This philosophy will enable them to optimally serve the interests of both their clients and society.”<sup>64</sup>

While Steele calls for a better standard and Craver calls for personal integrity to mitigate the use of deception in negotiations, attorney Van M. Pounds advocates a specific technique known as “mindfulness” as a path toward greater truthfulness in negotiations.<sup>65</sup> Mindfulness is a Buddhist practice that its proponents claim anyone can employ to achieve greater self-awareness as well as both internal and external harmony.<sup>66</sup>

Pounds claims that two mindfulness factors will lead lawyers to choose a more truthful path in negotiations.<sup>67</sup> First, because mindfulness enhances awareness of a negotiator’s interconnectedness with others, she will no longer see the opposing party as opposition but rather as an integral part of herself, thus greatly inhibiting the desire to deceive.<sup>68</sup> Second, because mindfulness enhances self-awareness, the negotiator will be able to choose between the habitual use of deceptive tactics and the corresponding truthful alternatives through a greater ability to sincerely consider the validity of the latter.<sup>69</sup>

Finally, Pounds counters the criticism that the practice of mindfulness will make the negotiator less effective by arguing that the rule of reciprocity

64. *Id.* at 734.

65. Van M. Pounds, *Promoting Truthfulness in Negotiation: A Mindful Approach*, 40 WILLAMETTE L. REV. 181 (2004). See generally JON KABAT-ZINN, WHEREVER YOU GO, THERE YOU ARE: MINDFULNESS IN EVERYDAY LIFE (1994); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students and Lawyers and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002).

66. See Pounds, *supra* note 65, at 183-84. Mindfulness is said to produce three fundamental consequences: (1) the ability to focus on the moment without cognitive intervention; (2) the ability to see things as they really are; and (3) the ability to see the true nature of everything through enhancing the appreciation of connection and change. *Id.* at 199. As Pounds analogizes, “it is akin to seeing the world from astraddle a motorcycle instead of the relative isolation found inside an automobile.” *Id.* at 200. Pounds describes the process of achieving mindfulness through the ancient Buddhist meditation practice, Vipassana (or “insight”). *Id.* at 203. First, the practitioner centers herself by focusing on the act of breathing. *Id.* Then, she expands her awareness to other bodily sensations, psychological matters, and eventually to the surrounding world. *Id.* Pounds concludes that mindfulness “is quite simply the art of conscious living.” *Id.* at 204.

67. *Id.* at 205.

68. *Id.* at 205-09. Pounds analogizes this tendency to the Golden Rule, saying that with this awareness “she will be less inclined to do unto *them* that which she would not have *them* do unto her.” *Id.* at 209.

69. *Id.* at 210-15.

will lead counterparties to repay greater truthfulness with greater truthfulness.<sup>70</sup>

*D. Is There a Distinctively Christian Alternative to Deception in Negotiation?*

It is evident not only that deceptive tactics are prevalent in negotiations, but also that in certain instances they are considered ethical by the American Bar Association.<sup>71</sup> Some commentators claim that these tactics are both unavoidable and appropriate due to a lawyer's responsibility to serve as a zealous advocate to her client.<sup>72</sup> Others claim they should be avoided for the sake of the legal profession, society, and the betterment of negotiators themselves.<sup>73</sup> Still others claim their use should be lessened through improved rules, individually-determined choices, and the use of an ancient Buddhist practice.<sup>74</sup>

With over three-fourths of the American population claiming adherence to the Christian religion,<sup>75</sup> it is worthwhile to consider whether or not Christianity offers an opinion as to the use of deception in the negotiation process.

---

70. *Id.* at 220-23. The chief criticism to which Pounds refers is an article published by Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83 (2002). Professor Peppet's argument that mindfulness will inhibit a negotiator's effectiveness is summarized in his conclusion:

Increasing one's awareness has ethical consequences. One becomes, over time, a different sort of person. And that sort of person may no longer wish to engage in certain negotiation strategies. Rather than becoming more free, moment-to-moment, to choose a negotiation approach, a mindful negotiator may constrain himself, limiting his freedom of action in deference to his ethical commitments. And this, particularly for lawyers, may chafe against the lawyer's understanding—or others' understanding—of the lawyer's role.

*Id.* at 96.

71. *See supra* Part II.A.

72. *See supra* Part II.C.1.

73. *See supra* Part II.C.2.

74. *See supra* Part II.C.3.

75. *See* KOSMIN & KEYSAR, *supra* note 8.

[Vol. 11: 395, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

## III. ANALYSIS

A. *The Standard*

At the outset of this analysis, it is important to establish a standard as to how Christianity attempts to interact with its surrounding culture. H. Richard Niebuhr's book, *Christ and Culture*,<sup>76</sup> is widely considered to be the seminal work in this area.<sup>77</sup> Niebuhr offered a five-part typology to address the topic: (1) Christ and culture as opposed to one another;<sup>78</sup> (2) Christ and culture in agreement with one another;<sup>79</sup> (3) Christ as above culture;<sup>80</sup> (4) Christ and culture in paradox;<sup>81</sup> and (5) Christ as the transformer of culture.<sup>82</sup> Although Niebuhr does not advocate one particular approach, it is apparent to readers that he preferred the approach of Christ as the transformer of culture.<sup>83</sup> Therefore, because Niebuhr's book is considered seminal, it

---

76. H. RICHARD NIEBUHR, *CHRIST AND CULTURE* (1951).

77. Thomas G. Bost & L. Timothy Perrin, *Practicing Law as a Christian: Restoration Movement Perspectives*, 32 PEPP. L. REV. 419, 423 (2005).

78. NIEBUHR, *supra* note 76, at 40. In this approach, Christ urges his followers to come out of the surrounding culture and be separate from it. One might picture the monastery as a picture of this approach or consider the missionary's call to "heathen" cultures to completely abandon their previous way of life. *Id.* at 40-41.

79. *Id.* at 41. In this approach, Christ is seen as a great cultural success story. His life and teachings are seen as the pinnacle of human achievement. In a democracy, he may be seen as a champion of democratic values (i.e., "all men are created equal"). From an Eastern perspective, he may be seen as one who advocates harmony among humanity. In communism, he may be seen as one who advocates equality for the poor and rails against the rich. In sum, Jesus is seen as the culmination of culture. *Id.*

80. *Id.* at 42. This approach is similar to the second (Christ and Culture in Agreement) in that Christ is seen as a culmination of cultural aspirations, but Christ Above Culture is differentiated because Christ is not seen as having risen from culture or having been a direct contributor to it. Instead, Christ is above that which humanity could ever achieve or envision. The writings of Thomas Aquinas exemplify this approach. *Id.*

81. *Id.* at 42. In this approach, a follower of Christ discovers a persistent tension between Christ and Culture. This approach is similar to Christ Against Culture in that it finds conflict between the teachings of Christ and the surrounding culture, but it is distinct in that it does not call followers of Christ to separate themselves from society. Instead, the Christian faces a dualist approach to life: obedience to Christ while also obeying the rules of the society in which she lives. Martin Luther is representative of this approach. *Id.* at 42-43.

82. *Id.* at 43. In this approach, Christ is seen as one seeking to convert society into something better. Humanity is seen as fallen, but instead of seeking to withdraw from it (Christ Against Culture) or endure it (Christ and Culture in Paradox), Christ seeks to transform society. *Id.*

83. STANLEY HAUSER & WILLIAM H. WILLIMON, *RESIDENT ALIENS: LIFE IN THE CHRISTIAN COLONY* 41 (1989). In fact, Niebuhr's book claimed to be merely an objective sociological study. *See id.*

follows that the dominant Christian approach to its culture has been to seek to transform the world around it.<sup>84</sup>

However, Niebuhr's typology is not without criticism.<sup>85</sup> Another typology was set forth by John Howard Yoder.<sup>86</sup> Yoder offers three approaches instead of five: (1) the activist church,<sup>87</sup> (2) the conversionist church,<sup>88</sup> and (3) the confessing church.<sup>89</sup> Like Niebuhr, it is apparent that Yoder has a preference: the confessing church.<sup>90</sup> Under the Confessing Church approach, the primary goal of the Christian collective is not to effectively transform society, nor is it called to withdraw from the world.<sup>91</sup> Instead, the primary goal of the Christian collective is simply to *be* itself and to live counterculturally in the world as a distinctive community.<sup>92</sup> As it has been said, "The church doesn't have a social strategy, the church *is* a social strategy."<sup>93</sup>

In the remaining analysis, Yoder's Confessing Church approach will be employed to consider whether Christianity offers a distinct alternative to the use of deception in negotiations. Making use of this source is important for two reasons. First, this paper will not seek to prove or justify a Christian

---

84. For example, one might consider contemporary American political movements such as the Moral Majority and the Christian Coalition as extensions of this approach.

85. See Bost & Perin, *supra* note 77, at 423 (pointing out that even Niebuhr's critics acknowledge its usefulness to Christians in reflecting "on their proper relationship with the culture").

86. John Howard Yoder, *A People in the World: Theological Interpretation*, in THE CONCEPT OF THE BELIEVERS' CHURCH 250-283 (James Leo Garrett, Jr. ed., 1969).

87. HAUERWAS & WILLIMON, *supra* note 83, at 44. In this approach, the church's primary concern is to build a better society. It sees God at work in social change and calls on Christians to join in movements for social justice. *Id.* at 44-45. Consider the "social gospel" as a prime example of the Activist Church approach. Think "liberal" from a religious perspective. See *id.*

88. *Id.* at 44. In this approach, the focus shifts from society to the individual soul. Here, the Church has nothing to offer the world beyond the opportunity for all to experience inward change. *Id.* at 45. Consider the "altar call" as a prime example of the Conversionist Church approach. Think "conservative" from a religious perspective. See *id.*

89. *Id.* at 44. As Hauerwas and Willimon explain Yoder:

The confessing church is not a synthesis of the other two approaches, a helpful middle ground. Rather, it is a radical alternative. Rejecting both the individualism of the conversionists and the secularism of the activists and their common equation of what works with what is faithful, the confessing church finds its main political task to lie, not in the personal transformation of individual hearts or the modification of society, but rather in the congregation's determination to worship Christ in all things.

*Id.* at 45.

90. See Yoder, *supra* note 86.

91. HAUERWAS & WILLIMON, *supra* note 83, at 46-47.

92. See *id.*

93. *Id.* at 43.

[Vol. 11: 395, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

approach by appealing to its ultimate effectiveness. Second, it will not attempt to prove or justify a Christian approach by appealing to whether or not it will make the world a better place. Instead, the objective will simply be to determine what a Christian perspective is in regard to the use of deceptive tactics in negotiations. From there, the only concern, given the Confessing Church approach, is faithfulness to that conclusion.

### B. *The Bible*

In the Christian Bible, negotiation itself is not presented as inherently evil.

There are negotiations that are portrayed as evil. A prime example is the first negotiation in the Christian Bible,<sup>94</sup> the famed negotiation in the Garden of Eden between the Serpent and Eve.<sup>95</sup> In this story, the Serpent used deceptive tactics to convince Eve to eat the forbidden fruit.<sup>96</sup> Another negative example of negotiation occurs between Jacob and his brother Esau.<sup>97</sup> There, Jacob was preparing some stew when Esau came in from the field famished, claiming to be near death.<sup>98</sup> Jacob used his negotiation power to obtain Esau's birthright as the eldest son before giving him something to eat.<sup>99</sup> The continued narrative displayed the problems that followed from Jacob's hard negotiation tactics.<sup>100</sup>

On the other hand, there are negotiations that are portrayed as noble because God himself served as one of the parties. The most extensive example is the negotiation Abraham had with God over the fate of the city of

---

94. If taken as a literal story, Christians would claim this to be the first negotiation in world history.

95. *Genesis* 3:1-6.

96. *Id.* The Serpent's truth was that eating the fruit from the tree in the middle of the garden would open her eyes to be like God in being able to discern good from evil, but his opening statement that she would not surely die was false. The combination of the two was deceptive. *Id.*

97. *Genesis* 25:29-34.

98. *Id.*

99. *Id.*

100. See *Genesis* 27:36-41. Jacob and Esau were twins. When Esau was delivered, Jacob was grasping his heel. Therefore, he was given the name Jacob, which literally means "he grasps the heel," but figuratively means "he deceives." *Genesis* 25:24-26. Following the birthright incident, Jacob deceived his father, Isaac, to get the "blessing" that was due Esau. Because of this, Isaac prophesied to Esau that he would "live by the sword and you will serve your brother." *Genesis* 27:1-40 (New International). This launched a long history of troubles between the eventual descendants of Jacob (the Israelites) and Esau (the Edomites). See generally *Genesis* 36; *Numbers* 20:14-21; *Deuteronomy* 2:1-6.



Sodom.<sup>101</sup> Here, God revealed to Abraham that he would destroy the city if he discovered its sin to be as bad as its reputation.<sup>102</sup> Abraham bargained with God for the sake of the righteous people in the city, but in the end, Sodom was not spared.<sup>103</sup> A similar example of a noble negotiation occurred when Moses bargained with God to spare the Israelites.<sup>104</sup> And most notably, Jesus himself bargained with God over whether or not he must face crucifixion.<sup>105</sup>

Therefore, negotiation itself is not presented in the Christian Bible as inherently good or evil; however, both lying and deception are consistently portrayed as evil.

Among numerous Old Testament examples, certain references to lying and deception are particularly noteworthy. First, in the foundational story in the Garden of Eden, the serpent was said to be the most “crafty” of all the wild animals and is accused by Eve of deceiving her.<sup>106</sup> Second, the Ninth Commandment of the Ten Commandments that governed Israel stated, “You shall not bear false witness against your neighbor.”<sup>107</sup> Finally, in the collection of Proverbs that represented the wisdom of the nation of Israel are various maxims such as, “A good man obtains favor from the Lord, but the Lord condemns a crafty man,”<sup>108</sup> and, “A quick-tempered man does foolish things, and a crafty man is hated.”<sup>109</sup> Also in Proverbs is a list of seven

---

101. *Genesis* 18:16-33.

102. *Id.*

103. *Genesis* 18:16-19:29. Abraham asked God if he would destroy the city if there were fifty righteous people inside it. God agreed that he would not. Then, Abraham continued to drop the minimum number required until God agreed that he would not destroy Sodom if there were only ten. *Id.* However, according to the story there were not ten righteous people found in Sodom; other than allowing Abraham’s nephew and his two daughters to escape, the city was destroyed. *Id.*

104. *Exodus* 32:9-14. God was furious with the Israelites because they had constructed a golden calf to worship while Moses was on Mt. Sinai receiving the Ten Commandments. *Exodus* 32:1-8. When God threatened to destroy the people and make Moses himself into a great nation, Moses pleaded with God to spare the people by pointing to God’s promises in the past to Abraham, Isaac, and Jacob, and by appealing to the reputation God would garner among the Egyptians if he destroyed the people he recently rescued from their hands. *Exodus* 32:9-14.

105. *Matthew* 26:39. Jesus pleaded with God to spare his life, but concluded his request by acceding to God’s will regardless of his personal desire. *Id.* An additional dramatic example of when God himself engaged in negotiation was with Satan over the fate of Job, although Satan’s motive in the negotiation was anything but noble. *Job* 1:6-2:10.

106. *Genesis* 3:1, 13 (New International). “Crafty” is also translated as “subtle,” and “deceived” is also translated as “beguiled.” *Genesis* 3:1, 13 (Revised Standard).

107. *Exodus* 20:16 (Revised Standard).

108. *Proverbs* 12:2 (New International).

109. *Proverbs* 14:17 (New International).

[Vol. 11: 395, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

things God hates.<sup>110</sup> Two of the seven are “a lying tongue” and “a false witness who pours out lies.”<sup>111</sup>

The New Testament letters likewise contain explicit instructions to Christians to avoid falsehood and deceitful speech. The Apostle Paul wrote that “each of you must put off falsehood and speak truthfully to his neighbor, for we are all members of one body.”<sup>112</sup> The Apostle Peter gave similar instructions by citing two Old Testament passages. First, quoting from Psalms, “Whoever would love life and see good days must keep his tongue from evil and his lips from deceitful speech.”<sup>113</sup> Second, quoting Isaiah, and in reference to Jesus as an example to follow, “He committed no sin, and no deceit was found in his mouth.”<sup>114</sup>

Although the Bible as a whole consistently condemns the use of lies and deception, of central importance to Christians are the teachings of Jesus himself. The central passage in which Jesus addressed this topic is found in his most famous sermon, known as the “Sermon on the Mount.”<sup>115</sup> In it, Jesus addressed the popular practice of making oaths by swearing loyalty.<sup>116</sup> Jesus forbade oath taking and concluded, “Let what you say be simply ‘Yes’ or ‘No’; anything more than this comes from evil.”<sup>117</sup>

In this famous sermon, Jesus demanded more from his followers than what they had seen from the religious leaders of their day.<sup>118</sup> In forbidding them to swear loyalty by oath,<sup>119</sup> he criticized the then-current practice of

110. *Proverbs* 6:16-19.

111. *Proverbs* 6:17, 19 (New International).

112. *Ephesians* 4:25 (New International).

113. 1 *Peter* 3:10 (New International) (quoting *Psalms* 34:12-13).

114. 1 *Peter* 2:22 (New International) (quoting *Isaiah* 53:9).

115. The Sermon on the Mount is found in *Matthew* 5-7. The applicable text for this topic is located in *Matthew* 5:33-37.

116. WARREN CARTER, MATTHEW AND THE MARGINS: A SOCIOPOLITICAL AND RELIGIOUS READING 149 (2005). According to Carter, one would swear loyalty “to a city or public appointments; to the judicial system and business contracts; to memberships in clubs, associations, or guilds; for religious activities, and so on.” *Id.*

117. *Matthew* 5:33-37 (Revised Standard). Interestingly, many American Christians have refused to swear to tell the truth prior to giving testimony in court because of this specific passage. See generally Ted Olsen, *Why Isn't ‘Yes’ Enough?*, CHRISTIANITY TODAY, March 2007, available at <http://www.christianitytoday.com/ct/2007/march/20.24.html>.

118. “For I tell you, unless your righteousness exceeds that of the scribes and Pharisees, you will never enter the kingdom of heaven.” *Matthew* 5:20 (Revised Standard).

119. It should be noted that Jesus did not necessarily forbid the taking of oaths by his disciples in society at large. It is argued that this instruction was technically directed at interaction with God

using oaths as a deceptive way to create an entire category of possibly unreliable communications not guaranteed by oaths.<sup>120</sup> His closing directive to replace oaths with a simple yes or no demanded “straightforward, sincere, and trustworthy speech, which builds honest and trusting relationships and which derives from a person’s integrity.”<sup>121</sup> In so instructing, he removed the need for an oath to elicit trustworthy communication and equated the need for an oath—“anything more”<sup>122</sup>—with evil.<sup>123</sup>

Professor Dallas Willard takes this idea one step further by examining the deeper nature of the non-trustworthy communication condemned by Jesus: the desire “to get others to believe you and let you have your way.”<sup>124</sup> As Willard describes, the “wrongness” in swearing was that it led to “making use of people, trying to bypass their understanding and judgment to trigger their will and possess them for our purposes. Whatever consent they give to us will be uninformed because we have short-circuited their understanding of what is going on.”<sup>125</sup> Willard’s description of why Jesus disapproved of dishonest communication speaks to the very purpose behind deceptive tactics in a negotiation.

In sum, it appears that Jesus condemned the use of deceptive tactics by his followers in any setting.<sup>126</sup> Therefore, specifically in the negotiation setting, Jesus’ instruction is to employ the same level of honesty as if one were under oath in a court of law.

### C. The Rationale

There appears to be a tendency among Christian adherents to hear the teachings of the Christian Bible as a list of “do’s and don’ts” without

---

and the community of disciples. See CARTER, *supra* note 116, at 150. However, the teaching point applies under either interpretation: speech should be honest regardless of oath.

120. *Id.* at 149.

121. *Id.* at 150.

122. *Matthew* 5:37 (Revised Standard).

123. Jesus’ reference to “evil” is also translated as “the evil one,” a reference to Satan who is known from the beginning of the Christian Bible as the original deceiver. CARTER, *supra* note 116, at 150.

124. DALLAS WILLARD, *THE DIVINE CONSPIRACY: REDISCOVERING OUR HIDDEN LIFE IN GOD* 174 (1997).

125. *Id.* at 174-75.

126. This is as good a spot as any to insert an important caveat: Jesus was known to periodically break rules, particularly the rules concerning Sabbath. See *Matthew* 12:1-14; *Mark* 2:23-28; *Luke* 6:1-11. When confronted, his response was that these rules were made to benefit humanity, not vice versa. *Mark* 2:27. Therefore, an argument can be made that Jesus’ own instructions against deception might be breakable to help people in need (such as the poor and oppressed), but that argument is beyond the scope of this paper. For this article, it is assumed that the negotiator and his party are coming from a position of self-interest.

[Vol. 11: 395, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

considering the underlying rationale. The Christian Bible's teaching to avoid the use of deception in negotiations calls into question the reasoning behind the instruction.

In the Christian Bible—from its beginning in the Garden of Eden to its end in the book of Revelation—there is a consistent battle between the forces of good (represented by God) and the forces of evil (represented by Satan). The Apostle Paul framed a Christian worldview as a battle between those forces and explained, "For we are not contending against flesh and blood, but against the principalities, against the powers, against the world rulers of this present darkness, [and] against the spiritual hosts of wickedness in the heavenly places."<sup>127</sup> Therefore, a Christian ethic can be seen as a way of living that struggles against the forces of evil.

Identifying these forces of evil is no easy task. Professor Walter Wink has written extensively on what he calls the "Powers."<sup>128</sup> Wink downplays the traditional picture of demonic forces as little men in red suits and presents demons as "the actual spirituality of systems and structures that have betrayed their divine vocations."<sup>129</sup> He explains, "Evil is not just personal but structural and spiritual. It is not simply the result of human actions, but the consequence of huge systems over which no individual has full control."<sup>130</sup> Emblematic of this conception is Steinbeck's portrayal of

---

127. *Ephesians* 6:12 (Revised Standard). In another letter, Paul claims that Jesus "disarmed the powers and authorities." *Colossians* 2:15 (New International).

128. For an extensive treatment, see Professor Wink's trilogy: *NAMING THE POWERS: THE LANGUAGE OF POWER IN THE NEW TESTAMENT* (1984); *UNMASKING THE POWERS: THE INVISIBLE FORCES THAT DETERMINE HUMAN EXISTENCE* (1986); and *ENGAGING THE POWERS: DISCERNMENT AND RESISTANCE IN A WORLD OF DOMINATION* (1992).

129. WALTER WINK, *THE POWERS THAT BE* 27 (1998). For a vivid example of his point, Wink writes:

Think, for example, of a riot at a championship soccer game. For a few frenzied minutes, people who in their ordinary lives behave on the whole quite decently suddenly find themselves bludgeoning and even killing opponents whose only sin was rooting for the other team. Afterward people often act bewildered and wonder what could have possessed them. Was it a "riot demon" that leapt upon them from the sky, or was it something intrinsic to the social situation: a "spirituality" that crystallized suddenly, caused by the conjunction of an outer permissiveness, heavy drinking, a violent ethos, a triggering incident, and the inner violence of the fans? And when the riot subsides, does the "riot demon" rocket back to heaven, or does the spirituality of the rioters simply dissipate as they are scattered, subdued, or arrested?

*Id.* at 28.

130. *Id.* at 31.

the bank as a monster over which its foreclosure agents have no control in *The Grapes of Wrath*.<sup>131</sup>

Given this conception, examples of the forces against which Christianity claims to battle would be concepts such as Greed, Power, and Insecurity, as encountered through social systems and structures such as Business, Government, and Religion. Jesus, then, is seen by his followers as one who disarmed these Powers,<sup>132</sup> allowing his followers to live free from the control of such powerful forces. With this in mind, Christianity's belief system allows one to see the world from a different vantage point and concomitantly allows its adherents to live differently as well.<sup>133</sup> A Christian no longer has to succumb to pressure from the business world or from the government to win an argument or to get as much money as possible; instead, she is freed to focus on the development of healthy relationships with everyone—something deception naturally prohibits.

In sum, a Christian instruction to avoid self-interested deception is more than a rule to follow or the declaration of an abstract moral principle. Instead, it is seen as a conscious choice made by those set free from the destructive forces of evil so that healthy relationships can be formed with others based on reliability and respect. Therefore, the reason a Christian chooses to employ the same level of honesty at the bargaining table as he would under oath in a courtroom is because he is free to do so. "Winning" or "getting ahead" is not an uncontrollable force, and neither is as important as the formation of healthy, trustworthy relationships with the parties on both sides of the table.

#### *D. The Reality*

What a distinctively Christian approach to deception in the negotiation process would look like in the real world of the negotiator can be addressed both conceptually and practically.

---

131. JOHN STEINBECK, *THE GRAPES OF WRATH AND OTHER WRITINGS 1936-1941*, 244 (1996).

"We're sorry. It's not us. It's the monster. The bank isn't like a man." "Yes, but the bank is only made of men." "No, you're wrong there—quite wrong there. The bank is something else than men. It happens that every man in a bank hates what the bank does, and yet the bank does it. The bank is something more than men, I tell you. It's the monster. Men made it, but they can't control it."

*Id.*

132. See *Colossians* 2:15.

133. See *Romans* 12:2 (New International). "Do not conform any longer to the pattern of this world, but be transformed by the renewing of your mind. Then you will be able to test and approve what God's will is—his good, pleasing, and perfect will." *Id.*

[Vol. 11: 395, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Conceptually, because a Christian negotiator would approach the table from a different viewpoint than others, the approach would necessarily be characterized by its creativity. Creativity is an admirable trait to negotiation theorists who claim that it is often overlooked because negotiators are too focused on the competitive aspect of a negotiation.<sup>134</sup> Because a Christian approach is not focused on competitive “must win” forces, it remains free to develop creative solutions.<sup>135</sup> A Christian negotiator would theoretically create potential solutions that no one else might have imagined.

Because a Christian negotiator does not have the same fundamental desires as others, the approach would also be characterized by its fearlessness. According to negotiation theorists, a reason negotiators often fail to improve their skills is the fear of making mistakes.<sup>136</sup> Because a Christian negotiator is not consumed by winning as an end goal to itself, she is free to act in ways that others would tend to avoid.<sup>137</sup> A Christian negotiator would theoretically develop skills otherwise unattainable because of her lack of fear.

Because a Christian negotiator’s primary concern is the formation of healthy relationships with all others, the approach would also be characterized by its ability to be aware of the needs of all the parties involved. A Christian negotiator would not only seek the best for his client but also for his adversary.<sup>138</sup> It is noteworthy that in this regard a Christian

134. THOMPSON, *supra* note 3, at 183.

135. See Wink, *supra* note 129, at 98-111. Wink draws attention to the creative solutions generated by Christian thought in describing what he terms Jesus’ “Third Way” to respond to violence. See *id.* Wink reimagines Jesus’ instructions to turn the other cheek, strip naked, and go the second mile as instructions to think creatively, “improvising new tactics to keep the opponent off balance,” instead of counsel to get beaten up by an oppressor. *Id.* at 109.

136. THOMPSON, *supra* note 3, at 7.

137. See HAUERWAS & WILLIMON, *supra* note 83, at 47-48. Willimon uses a conversation he had after the U.S. bombing of civilian targets in Libya as an example of what fearlessness might look like in Christian America. Willimon suggested that the Church sending a thousand missionaries to Libya might be a more appropriate Christian response than bombing, to which his friend responded that his proposal would be impossible because it would be illegal. Willimon replied that it is impossible not because it is illegal, but because the Church is no longer that fearless. *Id.*

138. This ability is directly related to Bishop Desmond Tutu’s famous definition of true revolution, when “the oppressed are freed from being oppressed and the oppressors are freed from being oppressors.” SHANE CLAIBORNE, *THE IRRESISTIBLE REVOLUTION: LIVING AS AN ORDINARY RADICAL* 306 (2006). It is important to explain that seeking the “best” for the adversary—or even the client—is not synonymous with seeking what the party would “want.” Instead, seeking what is “best” or “fair” or “right” may very well be the direct opposite of what a party desires to happen in a negotiation.

approach is in harmony with the Buddhist practice of mindfulness.<sup>139</sup> It is likewise susceptible to the same criticism of lessening the negotiator's effectiveness.<sup>140</sup> This criticism can be countered by emphasizing the unique advantages previously discussed (creativity and fearlessness), but more importantly, by recalling that effectiveness is not a primary goal of a Christian approach.<sup>141</sup> Nonetheless, there appears to be a distinct advantage in the ability to consider the needs of all the parties at the bargaining table, and a Christian negotiator would theoretically be able to consider the perspective of not only his client but also the opposing party.<sup>142</sup>

It may be helpful to consider what a Christian negotiator would look like from a practical perspective.<sup>143</sup> To do so, imagine two professional settings: the trial attorney and the sports agent.

### 1. The Trial Attorney

The trial attorney is representing a plaintiff in a personal injury suit and receives a settlement offer from a defense attorney representing a large corporation. Because he is a Christian negotiator, his primary concern is the well-being of his client *and* the well-being of the large corporation. This does not mean he wants both sides to be happy with him or the negotiation's outcome; in fact, he is willing to be quite unpopular. Instead, he seeks the best for both parties irrespective of their declared "wants." He is guided by words such as "fair" and "just."

Likewise, he is not concerned about how the outcome of the case will affect his personal win-loss record, his bank account, or his personal security. He has every intention of being upfront and honest in everything he says and does in this negotiation and would not say anything that he would not likewise say under oath in a courtroom under penalty of perjury. He has every intention of leaving the negotiation having acted in such a way that would merit the respect of everyone involved in it through his honesty and reliability.

Whether he will accept the offer, refuse it and go to court, or submit a unique counter-offer is not the point. Instead, the point is that his response will be guided by his twin desires to create the best possible solution for

---

139. See *supra* notes 65-70 and accompanying text.

140. See *supra* note 70.

141. See *supra* Part III.A.

142. Considering the needs of the opposing party is known in the parlance of negotiation theory as a strategy called "perspective-taking." See THOMPSON, *supra* note 3, at 81.

143. This is reminiscent of the story of John the Baptist in the Gospel of Luke when John specifically tells people of certain professions—soldiers and tax collectors—how they should live in response to his call for repentance. *Luke* 3:1-14.

[Vol. 11: 395, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

everyone involved and to create healthy relationships with everyone based on honesty.

Because he is committed to being upfront and honest with everyone, his client would know his approach from the outset; however, if for some reason his client decides to be furious that his lawyer is not seeking to demolish the other side or is unwilling to use deceptive tactics within the bounds of the rules of ethics, the trial attorney would not be fazed or surprised. In fact, he would even be willing to suffer personal loss to remain faithful to his approach.

## 2. The Sports Agent

Likewise, the sports agent is representing a professional athlete and receives a contract offer from team management. Again, because she is a Christian negotiator, her primary concern is the well-being of both athlete and team. She is not concerned about how the outcome of the case will affect her ability to get other clients or her personal bank account. She has every intention of being upfront and honest in everything she says and does and would not say anything that she would not likewise say under oath in a courtroom under penalty of perjury. She has every intention of leaving the negotiation with a positive relationship with everyone involved in it.

Whether she will accept, refuse, or counter the offer is immaterial. Instead, she simply seeks to create the best possible solution for everyone involved and to foster healthy relationships. She may very well have a difficult time securing future clients, but then again, she may turn out to be the most popular sports agent of all. Neither outcome is her primary concern.

### *E. The Ramifications*

It is interesting to consider the ramifications a distinctively Christian approach to deception in negotiations—that is to say, employing the same level of honesty in negotiations as would be employed under oath in a court of law—would have on the law and society in general.

To begin, its adoption as an ethical or legal standard would necessarily revolutionize the concept of the lawyer's role as the neutral partisan of the client.<sup>144</sup> In other words, as long as the lawyer's role is to work solely for

---

144. See *supra* notes 23-24 and accompanying text.



the unmitigated self-interest of the client, the use of deceptive tactics are both useful and desirable. To adopt a distinctively Christian approach, the role of the lawyer would necessarily be reimagined as one seeking the best solution for all parties involved.

However, consistent with the Confessing Church model of Christianity,<sup>145</sup> adopting the Christian approach as an ethical or legal standard is not a Christian goal. A Christian approach presupposes a general (non-Christian) worldview that acts and thinks in terms of self-interest and would not expect societal agreement on a standard that seeks the good of the counterparty as well.<sup>146</sup>

The impact adopting a Christian standard would have on society is open for debate.<sup>147</sup> On one hand, arguments have already been made that it would improve the public opinion of the legal profession as well as generate a greater level of fairness in the ultimate agreements produced.<sup>148</sup> Further, since negotiation theorists argue that consideration of the other party's position<sup>149</sup> and seeking to create win-win agreements produce better agreements for both parties,<sup>150</sup> it is possible that the adoption of a distinctively Christian standard would actually improve overall agreements for both sides. On the other hand, given a predominantly adversarial, competitive, survival-of-the-fittest approach to both the marketplace and the law in American society, a Christian standard would arguably inhibit the effectiveness of a negotiator's ability to seek the win for his client as the opponent of the client's adversary.<sup>151</sup>

Therefore, an evaluation of societal impact appears to depend on whether one believes a communal or individualistic approach leads, in the end, to a better society.

However, given the majority status of Christianity in the United States, a wide embrace of this standard by Christian lawyers/negotiators (and clients) would produce a significant impact on the legal profession as a whole. For many, adopting the standard would necessitate a reimagining of their entire

---

145. See *supra* Part III.A.

146. The Apostle Paul instructed Christians to “[d]o nothing out of selfish ambition” and to “look not only to your own interests, but also to the interests of others.” *Philippians* 2:3-4 (New International). See also *Galatians* 5:13 (instructing Christians to use their freedom to serve others and not to be self-indulgent).

147. Again, given the Confessing Church model, effectiveness in transforming society is not a primary concern of Christianity. See *supra* Part III.A.

148. See *supra* Part II.C.2.

149. See THOMPSON, *supra* note 3, at 81-82.

150. *Id.* at 74-95.

151. See Wetlaufer, *supra* note 25.

[Vol. 11: 395, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

careers.<sup>152</sup> Some may very well feel the need to quit their jobs; others will redefine the way they approach them.<sup>153</sup> Some may lose clients and jobs; others may be more popular than ever. Nonetheless, a wide embrace of a Christian approach in the United States would lead to a noticeably different approach to the negotiation table. In the end, whether or not that would be better than the situation at present depends entirely on one's perspective.

#### IV. CONCLUSION

Certain types of deceit are allowed by current legal and ethical standards, and they are encouraged at the negotiation table due to their effectiveness in securing a win for a client. However, inner moral compasses lead many to wonder if the use of deceptive tactics is morally right. There are a variety of approaches to this dilemma. There is a distinctively Christian approach.

From a Christian perspective, negotiators would use the same level of honesty in a negotiation as they would under oath in a court of law. The rationale behind this approach is to allow the negotiator, client, and counterparty to live free from the destructive cultural forces that encourage deception,<sup>154</sup> thus allowing the best possible agreement to occur for everyone involved as well as the formation of healthy relationships based on reliability and respect.

As Jesus famously stated, "If you hold to my teaching, you are really my disciples. Then you will know the truth, and the truth will set you free."<sup>155</sup>

---

152. See CLAIBORNE, *supra* note 138, at 137-43. Claiborne writes, "In the early church, whenever converts sought baptism, their entire careers were reimagined." *Id.* at 139.

153. *Id.* at 140. To the redefinition of career, Claiborne writes, "We may still be a doctor, but we will be a different kind of doctor." *Id.* The easy application: A Christian lawyer/negotiator may still be a lawyer/negotiator, but he or she will be a different kind of lawyer/negotiator.

154. "Conversion is not an event but a process, a process of slowly tearing ourselves from the clutches of the culture." *Id.* at 150.

155. *John* 8:31-32 (New International).

